

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
HISPANIC INFORMATION AND)	File No. BPLIF-951016AW
TELECOMMUNICATIONS NETWORK, INC.)	
)	
For Authority to Construct and Operate Station in)	
the Instructional Television Fixed Service on the)	
D-Group Channels at Springfield, Massachusetts)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 2003

Released: July 22, 2003

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed by Hispanic Information and Telecommunications Network, Inc. (HITN) on November 14, 1997.¹ HITN seeks review of the August 28, 1997 action by the Video Services Division (Division) of the former Mass Media Bureau dismissing the above-captioned application. For the reasons stated herein, we deny the application for review.

II. BACKGROUND

2. On May 11, 1994, HITN filed its application for a construction permit and license for a new Instructional Television Fixed Service (ITFS) station on the D Group channels at Springfield, Massachusetts.² On October 20, 1995, HITN filed a permissible major amendment to the application to, *inter alia*, specify a new transmitter site.³ In that amendment, HITN provided a co-channel interference study. That study showed that Station WLX831, New Britain, Connecticut, operating on Channels D3 and D4 and licensed to the National Conference on Citizenship (NCC) was 27.1 miles from HITN's proposed transmitter site.⁴ The amendment, however, did not address the issue of potential interference to Station WLX831. Instead, HITN indicated, "No objection letter to be obtained."⁵

3. On August 28, 1997, the Division's Distribution Services Branch (Branch) dismissed HITN's application because the proposed facility would cause harmful interference to the protected service area of

¹ Hispanic Information and Telecommunications Network, Inc. Application for Review, filed Nov. 14, 1997 (Application for Review).

² FCC File No. BPLIF-951016AW. The D Group channels consist of the frequencies 2554-2560 MHz, 2566-2572 MHz, 2578-2584 MHz, and 2590-2596 MHz. See 47 C.F.R. § 74.902(a).

³ Amendment (filed Oct. 20, 1995).

⁴ Amendment, Figure 6.

⁵ *Id.*

Station WLX831.⁶ On September 29, 1997, HITN filed a petition seeking reconsideration of the dismissal of its application.⁷ In that petition, HITN argued that the Commission should accept the “no objection” letter that it had obtained from NCC as a curative amendment to the application.⁸ On October 9, 1997, the Division denied HITN’s petition.⁹ The Division noted that although HITN believed that its attached consent letter from NCC resolved any question of interference to Station WLX831, “[t]he only attachment to HITN’s reconsideration petition . . . is a copy of the staff’s letter dismissing the subject application.”¹⁰ The Division also stated that it was under no obligation to accept a curative amendment after an application had been dismissed.¹¹ HITN then submitted the instant application for review.

III. DISCUSSION

4. In its application for review, HITN claims that the dismissal of its application was arbitrary and capricious in violation of the Administrative Procedure Act.¹² In support of this proposition, HITN argues that although the application processing changes adopted in MM Docket No 93-24¹³ were clearly substantive “there was no notice and comment period.”¹⁴ HITN also claims that applications filed prior to the *1995 Report and Order* are treated with greater leniency than those filed after and thus, similarly situated applicants are being held to different standards.¹⁵ In addition, HITN contends that the Commission must allow the late filing of the consent letter because there would be no comparative upgrade¹⁶ to the HITN application, and it is not a technical or engineering document specifically barred

⁶ See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Hispanic Information and Telecommunications Network, Inc. (dated Aug. 28, 1997). The Branch also concluded that while HITN was attempting to rely on frequency offset, HITN could not rely on frequency offset in lieu of a signed agreement between the parties. *Id.*

⁷ Hispanic Information and Telecommunications Network, Inc. Petition for Reconsideration (filed Sep. 29, 1997) (Petition for Reconsideration).

⁸ Petition for Reconsideration at 9.

⁹ See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Benjamin Perez, Esq. (dated Oct. 9, 1997) (*Letter*).

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² Application for Review at 3, 13.

¹³ See Amendment of Part 74 of the Commission’s Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd 2907 (1995) (*1995 Report and Order*).

¹⁴ Application for Review at 13.

¹⁵ *Id.* at 13-14.

¹⁶ At the time HITN filed its original application and major amendment, in cases of mutually exclusive applications - where applicants were competing for the same or adjacent channels in the same geographic area, each application was reviewed pursuant to the Commission’s comparative process. This procedure awarded a maximum of twelve merit points based on five criteria deemed to have been most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum had been allocated. See Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to the Instructional Television Fixed Service, *Second Report and Order*, 101 FCC 2d 49, 65-72 (1985) (*Second Report and Order*); 47 C.F.R. § 74.913 (1993). Once an application was filed and found to be acceptable for filing, the application was placed on an “A” cut-off list, which established a deadline for filing mutually exclusive applications. If one or more mutually exclusive applications were filed and found acceptable for filing, those applications would be placed on a “B” cut-off list. That public notice would, *inter alia*, establish the deadline by which all of the applicants could file amendments to their applications by which they could improve their comparative position under the point system. See *Second Report and Order*, 101 FCC 2d at 73-75. The interference consent letter at issue in this case, however, would not have impacted HITN’s comparative standing under the point system.

by the *1995 Report and Order*.¹⁷ Next, HITN states that the Commission's use of the "letter perfect" standard is improper,¹⁸ and because the Commission has been lenient in the financial requirements for ITFS applicants, "[t]here is no reason not to extend such treatment to another area which will otherwise permit the processing of the subject application to grant."¹⁹ Finally, HITN states that the Commission has violated the Paperwork Reduction Act of 1995 by requiring applicants for ITFS licenses "to gather more information to include in its [sic] application than previously required . . . without OMB approval."²⁰

5. As an initial matter, we point out that the requirement to submit consent letters with the original application predates the *1995 Report and Order*. The rules in effect at the time HITN filed its application required it to submit the consent letter from NCC with the original application. Specifically, Section 74.903(b) of the Commission's Rules required HITN to submit as part of its application "[a]n analysis of the potential for harmful cochannel interference with any authorized or previously proposed station if . . . the proposed transmitting antenna has an unobstructed electrical path to receive site(s) of any other station(s) that utilize(s), or would utilize, the same frequency, or [t]he proposed transmitter is within 80.5 km (50 miles) of the coordinates of any such station."²¹ HITN was required to submit an interference analysis for Station WLX831 because it was a co-channel station located 29.1 miles from HITN's proposed transmitter site. As an alternative to providing an interference analysis, HITN could have submitted a statement from NCC stating that any resulting interference was acceptable.²² HITN's application stated that it would provide a consent letter from NCC, but it did not provide that letter. Therefore, HITN's application was clearly incomplete when filed.

6. Further, based on the record before us, it appears that HITN has never filed the NCC consent letter with the Commission. Although it claimed to have included this letter in its petition for reconsideration, HITN did not attach any consent letter to the petition or any other submission. In this connection, we agree with the Division that

HITN's implicit request that we reinstate its application and defer processing until such time as HITN is able to obtain a consent letter from NCC is not only inconsistent with the Commission's filing requirements and processing procedures, but would also unduly disrupt the staff's processing of other pending applications which fully comply with the Commission's requirements.²³

We nonetheless note that, even if HITN had produced the NCC consent letter with its petition for reconsideration, for the reasons discussed below, we would not grant the instant application for review.

7. In particular, HITN's statement that the Division's dismissal of the application was arbitrary and capricious because "there was no notice and comment period" for the ITFS window filing procedures is incorrect. As noted above, the requirement to submit consent letters in lieu of interference studies predates the establishment of the new filing procedures for ITFS. In any event, a *Notice of Proposed Rulemaking* was released on February 25, 1993 that sought comment on the window filing procedures

¹⁷ *Id.* at 14-16.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 16.

²⁰ *Id.*

²¹ 47 C.F.R. § 74.903(b)(1) (1994).

²² 47 C.F.R. § 74.903(b)(4) (1994).

²³ *Letter* at 2.

adopted in the *1995 Report and Order*.²⁴ As a result, HITN's argument that the Division's action here was arbitrary and capricious, to the extent that it was in accordance with or reliance on the *1995 Report and Order*, because there was no notice and comment is unfounded.

8. HITN is also incorrect in its assertion that the Commission is treating similarly situated applicants differently.²⁵ In support of this argument, HITN cites generally to *Fishburne Military School*²⁶ for the proposition that it is unfair to dismiss HITN's application for failing to provide the NCC consent letter when the Commission did not dismiss the applications in *Fishburne* despite the applicants' failure to designate any programming as formal educational on FCC Form 330's illustrative schedules.²⁷ We find that *Fishburne* is readily distinguishable from this case. *Fishburne* deals with the issue of how to treat internal inconsistencies in an application for purposes of determining whether the applicant was entitled to points under the old comparative selection system. In that case, applicants for ITFS licenses proposed an average of twenty-one hours of formal educational programming – which would have entitled the applicant to merit points – in the programming grids part of the applications, but failed to similarly designate such programming in the illustrative schedules part of the applications.²⁸ Although the applicants filed amendments so that the illustrative schedules matched the programming grids, the Commission found that the amendments were not entitled to comparative consideration because they were filed after the “B” cut-off date.²⁹ The instant case is different from *Fishburne* because all the information required by the Commission's Rules was contained within the *Fishburne* applications prior to action being taken thereon, and because the inconsistency did not affect the acceptability of the application for filing.³⁰ To the contrary, HITN's application failed to include an important part of the interference showing required by our Rules.

9. Indeed, Commission precedent makes it clear that HITN's failure to file the NCC consent letter is a fatal defect warranting dismissal of its application. In this connection, we note that the Commission has required both before and after the *1995 Report and Order* that proper interference showings and consent letters from affected parties be submitted with the original application.³¹ Applications for new ITFS stations may be submitted only during a specific period or “window” announced by public notice.³² Pursuant to Section 74.903 of the Commission's Rules,³³ an application for an ITFS station must protect previously proposed facilities from interference and will not be granted if

²⁴ Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Notice of Proposed Rulemaking*, 8 FCC Rcd 1275 (1993); see also *1995 Report and Order*, 10 FCC Rcd at 2907-08 ¶¶ 2-4.

²⁵ Application for Review at 13-14.

²⁶ *Fishburne Military School, Memorandum Opinion and Order*, 11 FCC Rcd 18589 (1996) (*Fishburne*).

²⁷ Application for Review at 14.

²⁸ *Fishburne*, 11 FCC Rcd at 18591 ¶ 5.

²⁹ *Id.* at 18592 ¶ 7.

³⁰ We also note that the applicants in *Fishburne* were penalized in that they were not awarded the merit points for comparative consideration that they would have earned had they filled out their applications correctly prior to the “B” cut-off deadline. *Id.*

³¹ See, e.g., *Guadalupe Valley Electric Cooperative, Order on Reconsideration*, 11 FCC Rcd 7434, 7442-43 (1996); *In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335, 1465-66 (1994); *Family Entertainment Network, Inc., Order on Reconsideration*, 9 FCC Rcd 566, 567-68 n.10 (1994).

³² See *1995 Report and Order*.

³³ 47 C.F.R. § 74.903.

interference is predicted to occur.³⁴ Given that applications must be filed only during designated filing windows, it is vital that all necessary consent letters be submitted with the original application.³⁵ Considering consent letters that did not exist at the time the original application was filed encourages the filing of incomplete applications and places an undue burden on the Commission's limited resources.³⁶

10. We also reject HITN's argument that under the procedures adopted in the *1995 Report and Order*, it should have been allowed to amend its application to submit the consent letter from NCC.³⁷ Since HITN has never amended its application to provide the consent letter, this argument is moot. Moreover, Section 74.903(b) lists the showings relating to interference that all applicants "must include . . . with the application."³⁸ The *1995 Report and Order* discusses amendments of pending applications. HITN fails to cite any authority that would allow it to submit a consent letter after its application was dismissed. Moreover, we are not aware of any such authority or precedent.

11. Finally, although HITN claims that the Commission has violated the Paperwork Reduction Act of 1995 by requiring additional information of ITFS applicants without first obtaining the required approval of OMD, it has not specified what additional information the Commission has requested.³⁹ As a result, we find this argument to be without merit.

IV. CONCLUSION AND ORDERING CLAUSES

12. Because it failed to provide the NCC consent letter, HITN has not made the required interference showing as required by the Commission's Rules. Consequently, we affirm the Division's decision and deny HITN's Application for Review.

13. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Sections 1.115 and 74.903 of the Commission's Rules, 47 C.F.R. §§ 1.115, 74.903, the Application for Review filed by Hispanic Information and Telecommunications Network, Inc. on November 14, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ *Id.*

³⁵ See Albion Community Development Corporation, *Order on Further Reconsideration*, 18 FCC Rcd 7714, 7716 ¶ 7 (WTB PSPWD 2003).

³⁶ *Id.*

³⁷ See Application for Review at 14-15.

³⁸ 47 C.F.R. § 74.903(b).

³⁹ Application for Review at 16-17.